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KTS MUTUAL SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

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HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CASE NO: 14-03-2008-III]
13 NOVEMBER 2008

C ***REVENUE LAW:*** *Income tax - Assessment - Whether appellant an investment company holding as defined under s. 60F(2) Income Tax Act 1967 - 'Activities' - Interpretation of - Whether there was reason to differ from views of Special Commissioners - Income Tax Act 1967, s. 113(2)*

D This was an appeal against the decision of the Special Commissioners of Income Tax (Special Commissioners) dismissing the appellant's appeal against the revised assessment requiring an additional payment of RM6,116 including a penalty of RM2,293.87 imposed under s. 113(2) of the Income Tax Act ('the Act') for the assessment year 2003 made by the respondent. E The issues that arose were (1) whether the appellant was an investment company holding as defined under s. 60F(2) of the Income Tax Act 1967 and (ii) whether the penalty imposed under s. 113(2) of the Income Tax Act 1967 had any basis.

F **Held (dismissing appeal with costs):**

(1) The crucial issue was whether the word 'activities' in s. 60F(2) of the Act also referred to non-business activities. The Special Commissioners dealt with this issue and had G found that the word 'activities' refer to activities which bring in income and charitable activities though an objective of the appellant could not be treated as part of the 'activities' as they were not carried out for the purpose of producing income. There was no reason to differ from the views of the H Special Commissioners. In interpreting any word in a statute one must take into account the context in which it appears. The word 'activities' appears in a context of a definition and within that definition it talks of 'derivation of income' from investment as opposed to derivation of income from a business I source *ie*, operating a hotel. Hence the word 'activities' must refer to an activity which would generate income. Charitable activities could not by any stretch of imagination be treated as part of the business activities of the appellant. (paras 6 & 7)

(2) An appellate court would not disturb a decision unless it is shown that the respondent had taken into consideration irrelevant matters. Counsel for the appellant had not shown where the respondent had erred. This appeal thus had no merit. (para 9)

Case(s) referred to:
Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353 CA ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 60F(2), 113(2)

For the plaintiffs - Milton Foo; M/s Milton & Co Advocates
For the defendants - Ahmad Isyak Mohd Hassan (Mohd Harris Hanapi with him) Inland Revenue Board of Malaysia

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Appeal

[1] This is an appeal against the decision of the Special Commissioners of Income Tax (Special Commissioners) handed down on 28 January 2008 dismissing the appellant's appeal against the revised assessment requiring an additional payment of RM6,116 including a penalty of RM2,293.87 imposed under s. 113(2) of the Income Tax Act (the Act) for the Assessment Year 2003 made by the respondent.

Approach Of The Court In This Appeal

[2] The guiding principles are set out in the case of *Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2007] 5 CLJ 353 at p. 359 where the Court of Appeal said:

> Before I embark upon a discussion of the issue at hand, let me re-state what the leading authorities have said is the role of a court in a tax appeal by way of case stated. I will simply call it a tax appeal. Such a proceeding is not an appeal in the ordinary sense known to the law. In an ordinary appeal, an appellate court is entitled to interfere with findings of fact if there has been

A insufficient or no judicial appreciation of the evidence. In a tax appeal we the courts are bound by the findings of fact made by the Commissioners. And the drawing of inferences by the commissioners is beyond review by a court "unless it is such as no reasonable body of Commissioners, correctly directing themselves in law, could properly have drawn ..." (*Mamor Sendirian Berhad v. Director General of Inland Revenue* [1986] 1 CLJ 362; [1986] CLJ (Rep) 18, per Lord Keith of Kinkel). But we have the final say on questions of law.

Background

C **[3]** The admitted or proven facts as found by the special commissioners are as follows:

1. KTS Mutual Sdn. Bhd. (the appellant) is a company incorporated in Malaysia on 29 November 2000 and commenced its business on 18 January 2001.

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2. The appellant has an issued and fully paid-up share capital of RM5,000,000 as at 31 December, 2001 and divided among the following share holders:

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KTS Holdings Sdn Bhd	RM1,000,000
Kuan Dai Sdn Bhd	RM1,000,000
Dato' Sri Lau Hui Kang (Deceased)	RM1,000,000

F

KTS Timber Industries Bhd	RM 500,000
Rimba Istimewa Sdn Bhd	RM 500,000
Teleng Trading Sdn Bhd	RM 500,000

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Teras Intergrasi Sdn Bhd	RM 500,000

3. All the abovenamed companies are related and are companies within the KTS Group of Companies and the late Dato' Sri Lau Hui Kang was the chairman and director of these companies.

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4. The principal activities of the appellant as stated in the director's report are:

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- investment holding;
- management, and
- acting as a charitable organization rendering financial assistance to the needy.

5. The appellant had received dividend income and made donations and granted scholarships in the following years:

Year Ended Received	Dividend Made	Donations Granted	Scholarship
31.12.2001	-	RM4,000	-
31.12.2002	-	RM454,434	-
31.12.2003	RM600,00	RM511,950	RM46,775
31.12.2004	RM600,00	RM385,000	RM73,575

6. In 2002 the appellant had made an investment of RM7,500,000 in an associate company, KTS Trading Sdn. Bhd. The dividend income received from KTS Trading Sdn. Bhd. was the only source of income of the appellant. No new investment was made after 2002 and no dividend was declared and paid to appellant's shareholders in the years 2001 to 2004.

7. For years of assessment 2001 to 2003 the appellant had computed its income as a company carrying on a business and not as an investment holding company pursuant to s. 60F of the Income Tax Act 1967 (hereinafter referred to as "the Act") and submitted its tax return accordingly.

8. As a result of a tax audit, the respondent found that the appellant should be regarded as an investment holding company and subjected to tax pursuant to s. 60F of the Act.

9. The respondent revised the assessment for year of assessment 2003 and issued notice of assessment requiring the appellant to pay a total amount of tax payable of RM6,116 including a penalty of RM2,293.87 imposed under s. 113(2) of the Act.

10. The appellant being aggrieved by the assessment lodged a notice of appeal against the assessment made by the respondent.

11. Because of the respondent's tax audit finding for the year of assessment 2003, the appellant had to compute its income for year of assessment 2004 in pursuance with s. 60F in order to avoid being penalized under s. 113(2) for not doing so, but lodged in a Notice of Appeal against the assessment too.

12. Both appeals were forwarded by the respondent to the Special Commissioners of Income Tax for determination.

Issues

[4] The issues in this appeal are similar as before the special commissioners and they are:

(i) Whether the appellant is an investment holding company as defined under s. 60F(2) of the Income Tax Act 1967?

Investment Holding Company is defined in s. 60F(2) as follows:

> A company whose activities consist wholly in the making of investments and whose income is derived therefrom.

[5] Mr. Milton Foo, counsel for the appellant, submitted that the appellant cannot be held to be a company whose activities consist of wholly making investments as it also acts as a charitable organization. In making this contention, he relied on the fact that the special commissioners had found that the appellant is involved in activities of investment holding, management and acting as a charitable organization rendering financial assistance to the needy.

[6] With respect to counsel for the appellant, the crucial issue is whether the word 'activities' in s. 60F(2) of the Act also refer to non-business activities. The special commissioners in fact dealt with this issue and had found that the word 'activities' refer to activities which bring in income and charitable activities though an objective of the appellant cannot be treated as part of the 'activities' as they are not carried out for the purpose of producing income.

[7] Having considered the submissions made by respective counsels with care, I see no reason to differ from the views of the special commissioners. In interpreting any word in a statute one must take into account the context in which it appears. The word 'activities' appears in a context of a definition and within that definition it talks of 'derivation of income' from investment as opposed to derivation of income from a business source ie, operating a hotel. Hence the word 'activities' must refer to an activity which would generate income. Charitable activities cannot by any stretch of imagination be treated as part of the business activities of the appellant.

[8] Accordingly I find the contention of the appellant to be without merit.

(ii) Whether the appellant has made an incorrect return by omitting or understating any income that warranted the respondent to impose the penalty under s. 113(2) of the Income Tax Act 1967, or whether the imposition of the penalty under the circumstances of the case is fair and justified.

[9] As this question concerns an exercise of discretionary power, an appellate court would not disturb that decision unless it is shown that the respondent had taken into consideration irrelevant matters. Regrettably I have not been shown by appellant's counsel where the respondent had erred. Accordingly 1 also find this appeal has no merit.

Conclusion

[10] For all the reasons stated above, I dismiss this appeal with costs to the respondent.